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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. JOSE LUNA et al., Defendants and Appellants.	B174881 (Los Angeles County Super. Ct. No. VA069850)

APPEAL from judgments of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Charlotte E. Costan, under appointment by the Court of Appeal, for Defendant and Appellant Jose Luna.

Verna Wefald, under appointment by the Court of Appeal, for Defendant and Appellant Rafael Picado.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Stephen D. Matthews and Kyle S. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Luna and Rafael Picado (collectively referred to as appellants) were each convicted by the same jury of one count of second degree murder (Pen. Code, § 187, subd. (a))[1] and one count of attempted murder (§§ 187, subd. (a) & 664), with findings as to each count that they each personally used a firearm (§ 12022.53, subd. (b)), and personally and intentionally discharged a firearm (§ 12022.53, subd. (c)). The jury also found as to each count that Picado had personally and intentionally caused great bodily injury or death (§ 12022.53, subd. (d)). Luna was sentenced to 62 years to life in prison. Picado was sentenced to 72 years to life. They each filed appeals. Both of them contend that the court erred in allowing the prosecutor to testify; in precluding discovery; in admitting evidence of threats; in admitting an expert's opinion testimony about gangs; in instructing the jury on the natural and probable causes doctrine; in sentencing them to consecutive terms; and they also contend that the cumulative effect of the errors created irreparable prejudice. Luna contends that there was insufficient evidence to support his convictions.

FACTUAL & PROCEDURAL BACKGROUND

In the late evening of August 11, 2001, Kevin Morris and Jerome Wright, African-American college football players, attended a party in a backyard in Buena Park. Their group of about 40 African-American and Hispanic friends then moved to a party in Norwalk, at a residence known to be in the territory of the Neighborhood gang. Most of the attendees at the second party were Hispanic. Sometime after midnight, Edwin Reed, one of Wright's friends, got into an altercation with some of the partygoers. After the party broke up, several Hispanic males confronted Reed and his friends. A fight broke out and shots were fired. Morris was killed by bullets and Wright was wounded. Reed was almost run over by a sports utility vehicle (SUV).

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[1] All further statutory references shall be to the Penal Code unless otherwise indicated.

The Investigation

Police arrived at the scene of the shooting shortly thereafter. The people who were still at the party were interviewed by police and videotaped. Detective Kevin Lowe recovered two bullet casings, a cell phone, a baseball cap, and sunglasses. No fingerprints were found on any of the items.

Jerome Wright was interviewed by Detective Lowe four times. Initially, he described a short, heavy-set, Hispanic man who pulled a gun on him, but could not identify the man. He also described another male Hispanic who shot him, got into a dark Ford Explorer, and drove off. When shown a photographic lineup shortly after the shooting, he wrote "looks like" next to Picado's picture. At another photographic lineup a few months later, he did not identify Luna's picture. At a live lineup almost a year after the shooting, he first identified one man as the shooter, then after talking to two other witnesses who were at the lineup, said he made a mistake and identified Luna as a "possibility."

Kavita Dutt, who was at the same live lineup with Wright, identified Luna as the man who had the gun. In other photographic lineups, she identified three other persons as the man with the gun.

Based upon Reed's and Wright's description of the SUV, police stopped a gray Ford Explorer about a month after the shooting. Picado was the driver and Luna was in the front seat. A semi-automatic .380-caliber pistol was on the floor board. The firearm was tested and it was determined that it had not been used to shoot Morris or Wright but had fired two of the bullets found at the party site. It was possible, but not likely, that another bullet found at the scene came from this gun.

Police later searched both Picado's and Luna's residences and found miscellaneous gang memorabilia linking them to the Neighborhood gang, but nothing which would tie them to the shooting.

From the party videotape, Detective Lowe identified, located, and interviewed Alfred Alarcon at both the Orange County and Los Angeles County jails. Alarcon said he was at the party when the fight started. He saw a Ford Explorer parked at the party

site. Alarcon told Lowe he saw Picado grab a large gun and shoot Morris, and that Luna fired toward a group of Black men. He identified appellant and Luna from a photographic lineup.

Trial Testimony

Wright testified that as he and his friends were leaving the party, about 12 male Hispanics confronted them, blocking their exit. They were dressed alike, with bald heads. Someone hit Reed, and three or four of the Hispanic males jumped on him. Morris then joined the fight and someone pulled out a gun. Wright and his friends ran off. Wright hid behind an Explorer, and someone walked around a corner and pulled a gun out. As Wright ran away, the gunman shot at him. His arm, back, and hip were wounded and he fell on the street. Wright's friend, Jason Orians, pulled him onto the curb and the gunman walked up to Wright and pointed the gun at his head. He then got in the Explorer on the passenger side and the car drove off. Wright heard someone say, "Fuck you niggers, that's what you deserve, Carmenita." Another smaller car also sped away, and the people in that car said, "Fuck you, nigger. That's what you deserve. We're going to kill your home boy."

Wright identified Picado as the man who pointed the gun in his face and as the one who punched Reed. He identified Luna as the man who first pulled a gun on him. He said he identified the wrong person at the live lineup because they were all Mexicans with bald heads and they all looked alike.

Deana Lopez testified that she had invited Wright and his friends to a party in her backyard, and then a friend of theirs told them about the party in Norwalk. After the party broke up and they were leaving, she heard screaming and saw someone take out a gun and she then heard shots. The man was short, about "five four," with short hair. He took off a white sweatshirt to reveal a plaid shirt underneath. Lopez went to her car and Wright was brought there by some others, bleeding. A dark colored Explorer pulled up and a male yelled, "You niggers got what you deserved. That's what you get for messing

with Carmellos." The shooter was in the front passenger seat of the Explorer. She could not identify Picado or Luna as the gunman.

Kavita Dutt testified that she attended the party. She saw Reed, a large man, bump into a Hispanic man wearing a hat. Reed apologized. Later, someone threw a bottle which hit Reed in the head. When he fell to the ground, four people rushed him. Three of Reed's football player friends came to his aid. When they heard shots, Dutt and her sister hid behind Kevin Brooks's van. They banged on the door of the van, and Brooks, who was sitting in the driver's seat, let them in. Dutt did not see who shot Kevin Morris. When the shooting was over, she saw a Hispanic man with slicked-back hair and a mustache, holding a gun. He was wearing shorts, no shirt, white socks, and black shoes with large tattoos on his chest and stomach. At trial she could not identify Luna as either the man with the gun or a person at the party. She said if she had identified Luna prior to trial, she was mistaken. At trial, she identified Picado as the man with the gun. Picado's tattoos were shown to Dutt but she said she did not recognize them.

Luna had no tattoos on his torso, chest, arms or back.

At trial, Alarcon admitted being at the party and seeing a fight but denied making statements to Detective Lowe and denied identifying Luna and Picado, even when confronted with a transcript of the interview and admitting that it was his signature next to the photographs.

Orlando Ramirez testified for the defense that he was at the party. He knew Picado and did not recall seeing him at the party. He knew who Luna was but did not know him personally. Lopez was fighting with a Black man, who in turn hit Ramirez, so Ramirez hit back. Someone stabbed him in the arm and the back. He heard gunshots but did not see who was firing.

Martha Herrera, also a witness for the defense, attended the party with other friends and her older brother, who was a Neighborhood gang member. She knew Picado, who was her brother's friend. She was in the backyard with Picado when shots rang out. Picado came with her to the front yard, and her brother picked them up in his car.

Marques Taylor, another defense witness, testified that he was a member of the Tragniew Crips, and was standing in his front yard when they saw a group of African-Americans arrive. One of the men was 6 feet 5 inches tall and 350 pounds. One of the men said he was from Lancaster and used the word "Crip."

Greg Lopez attended the party. He was not a gang member but did know members of the Neighborhood gang. At midnight a group of Blacks arrived. A large man in the group bumped into Lopez, spilling his beer. When Lopez demanded an apology, the man threatened to "cut" him. Later, Picado and Luna arrived. Lopez saw Edgar Franco fighting with Reed. Lopez threw a punch and the Black man started hitting him. When Lopez got up, the fight was in full swing and he heard shots. Lopez ran and hid behind a car. He was then shot in his left arm.

Deputy Sheriff Michael Ponce de Leon testified as an expert on criminal gangs. Picado and Luna were both members of a Hispanic gang known as "Neighborhood Norwalk." Picado's nickname was "Sad Boy" and Luna's was "Bee Gee." A rival Norwalk gang was named "Carmellos." In de Leon's opinion, a member of Carmellos would not ordinarily attend a party on Neighborhood's territory. In general, gangs instill fear in the public. When one of their members is disrespected they respond with violence that often leads to murder. Ordinarily when a gang member commits a crime he shouts out the name of his gang to take credit. Upon questioning by the prosecutor, de Leon explained that it would be unusual for a gang member to shout out the name of a rival gang in order to help his fellow members get away, but de Leon had heard of this happening on one other occasion.

DISCUSSION

1. The Prosecutor's Testimony

During two of Detective Lowe's three interviews of Alfred Alarcon, the Deputy District Attorney who prosecuted appellants, Mr. Enomoto, was present as well as a law clerk working for him. The prosecutor wrote a memorandum about one of those interviews, which took place on July 9, 2003. When Picado's counsel was cross-

examining Detective Lowe, he asked Lowe if Alarcon had referred to someone named "Wicked." Lowe testified that he remembered Alarcon mentioning someone named Wicked but that Alarcon did not know if Wicked was involved in the shooting. Picado's counsel then read the detective a sentence from the prosecutor's memorandum about the interview, as follows: "During our conversation Alarcon initially referred to one of the gunmen as Wicked." Detective Lowe then testified that that part of the memorandum was incorrect.

After a bench conference in which Picado's counsel argued that Lowe's testimony made the prosecutor a witness, Picado's counsel was allowed to further cross-examine the detective about the memo. Detective Lowe reiterated that Alarcon did not mention Wicked as one of the gunmen. Upon redirect by prosecutor Enomoto, Detective Lowe testified that during the second interview, Alarcon had mentioned seeing one of the "male Blacks" reaching toward his pants pocket. Picado's counsel objected, saying that any questions about that interview were tantamount to putting the prosecutor's credibility at issue. The trial court overruled the objection. Luna's counsel refused to stipulate to anything and said he would call the prosecutor to the stand. Detective Lowe proceeded to testify that Alarcon said he had not seen a weapon in any of the male Blacks' hands.

Just prior to the close of the prosecution's case, the prosecutor indicated that he intended to testify as a witness, "for the limited purpose of clarifying the Alarcon conversation in the Orange County Jail." Neither appellant objected. The prosecutor then took the stand, questioned by another Deputy District Attorney and the following colloquy occurred:

"Q. During the interview did Mr. Alarcon ever mention the name Wicked?"

"A. Yes. . . . When I first talked to him, we asked him how well did he remember the incident. He said very well. . . . At some point he said Wicked had a gun.

"Q. Was it Mr. Alarcon that brought up the name Wicked?

"A. Yes.

"Q. Were you taking any notes at this time?

"A. No.

"Q. Did you see Detective Lowe taking notes at this time?

"A. None of us was taking any notes.

"Q. Did you ask Mr. Alarcon how sure he was about people's nicknames?

"A. Yes.

"Q. What did you ask him?

"A. When he mentioned the name Wicked I asked him 'How sure are you about the nicknames of the people that were at the party?' And he said 'Well, I'm not really that sure.' So I said 'Well, if you're not sure about the names then you shouldn't refer to people by those names, if you don't know what their names are.'

"Q. How long was the conversation that you had with Mr. Alarcon in total?

"A. Maybe half an hour. I wasn't timing it. We were waiting around a lot for him to be brought out, so I'm not sure.

"Q. During the conversation were both you and Detective Lowe asking questions to Mr. Alarcon or was it just one of you?

"A. We both were at various times, but I know I was asking questions.

"Q. Regarding a photographic identification that Mr. Alarcon had made back in February of 2002, did you ask Mr. Alarcon how certain he was about that initial photo identification?

"A. Yes.

"Q. And what did he say about that?

"A. He said he was positive about the previous identifications he made from the photographs. We didn't show him the photographs at the time at the Orange County Jail.

"Q. That was my next question. The photo identifications that you're referring to all were just in words, that you're referring to Mr. Alarcon back to other identifications?

"A. Yes, when he mentioned Wicked and then he said[, ']Well, I'm not sure about the names.['] I said ['']Well, going back to when you picked out these photographs back in February, whatever it was, were you sure about the identifications you made at the time from the photographs.['] He said yes and I left it at that.

"Q. And when he said [']Yes, I'm sure about those identifications,['] was he hesitant in any way when he was telling you this, like I'm thinking about it, yeah, I am sure?

"A. No. He was unequivocal about his previous ID's.

"Q. Now, this interview, in this conversation that you had with Mr. Alarcon, was this documented in any way?

"A. Eventually I wrote a memo to defense counsel . . . dated July 14th.

"Q. And why did you write the memo and not the detective?

"A. Well, afterwards I volunteered to write a memo. . . .

"Q. And to your knowledge you're the only one that has actually documented that conversation?

"A. That's correct."

Appellants then both cross-examined the prosecutor.

The trial court found that the prosecutor was the only witness who could have testified to establish that the interview was documented and the memo given to the defense. Appellants' motions to strike the testimony and for a mistrial were denied. The trial court also ruled that the prosecutor would not be removed from the case because no other prosecutor could try the case at that point.

Appellants contend that the prosecutor should not have been allowed to testify because he vouched for Alarcon's credibility and there was no showing that the law clerk was unavailable to testify. They also contend that once the prosecutor testified, he should have recused himself.

The prosecutor is generally prohibited as acting as both an advocate and a witness. According to the State Bar Rules of Professional Conduct and the American Bar Association Model Rules of Professional Conduct, there are two exceptions: 1) when the issue to which the prosecutor testifies is uncontested, and 2) when the testimony is about the nature and value of legal services. (*People v. Donaldson* (2001) 93 Cal.App.4th 916, 929.) Case law articulates an exception for "'extraordinary circumstances and for

compelling reasons, usually where the evidence is not otherwise available.'" (*Id.* at p. 930, citing *United States v. Johnston* (7th Cir. 1982) 690 F.2d 638, 644.)

In *Donaldson*, a key witness being cross-examined by the defense testified that the prosecutor had said something to her just prior to the preliminary hearing which caused her to lie during her preliminary hearing testimony. The prosecutor then stated her intent to testify in a narrative fashion about the conversation and defense counsel objected only to the narrative fashion of her proposed testimony. The trial court overruled the objection and the prosecutor, questioned by another attorney from her office, proceeded to testify about a conversation with a witness just before the preliminary hearing. When defense counsel cross-examined her, he elicited her personal opinion about the witness's credibility. *Donaldson* discussed the exceptional circumstances present in *People v. Guerrero* (1975) 47 Cal.App.3d 441, in which the prosecutor testified about a witness's statement which was contradictory to the witness's trial testimony. *Guerrero* found the error harmless because the testimony involved an irrelevant fact. In *Donaldson*, the matter about which the prosecutor testified was highly relevant and was tantamount to a prosecutor's statement of personal belief in a witness's credibility or the accused's guilt. Because defense counsel did not object, the court found that there was ineffective assistance of counsel. (*People v. Donaldson*, *supra*, 93 Cal.App.4th at pp. 931-932.)

In *People v. Garcia* (2000) 84 Cal.App.4th 316, the prosecutor was present at the interview of various witnesses. The defense sought to call the prosecutor as a witness and the court denied its request. The Court of Appeal held the denial was not error since another interviewer had also been present, and thus extraordinary circumstances did not exist. (*Id.* at p. 332.)

Here, Luna indicated he wanted to call the prosecutor to the stand and the prosecutor offered to testify because the detective's testimony contradicted what was in the prosecutor's memo, as to whether Alarcon identified someone named "Wicked" as the gunman. This point would have been exculpatory for appellants since neither of them was nicknamed "Wicked." The prosecutor explained that Alarcon had said he was not

sure about the nicknames of people involved. The prosecutor's testimony, however, had the effect of discounting Detective Lowe's credibility, which also aided the defense.

The prosecutor was further questioned about what Alarcon said about his identifications of appellants. He maintained that Alarcon was sure about his identifications of appellants. While this appeared to bolster Alarcon's credibility, when taken in context, the effect was negligible. Alarcon's complete denial at trial was inherently unbelievable in the face of Detective Lowe's testimony, the transcript of his interview with Detective Lowe, and his signature next to the circled photographs of appellants. Therefore, there was little harm to appellants resulting from the prosecutor's testimony. As a result, there was no need for the prosecutor to disqualify himself. There is no showing in this record that the law clerk could have testified to the points addressed by the prosecutor, or what Alarcon said.

With respect to the claim that the questioning of the prosecutor constituted ineffective assistance of counsel, there appears a reasonable probability that defense counsel made a tactical decision to do so, especially since the prosecutor and Detective Lowe appeared to disagree with each other. This disagreement would weaken the case against appellants and would have been explored by a competent attorney. (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437, 442, 445.)

2. Denial of Discovery Request

There was evidence that witnesses heard someone say something that sounded like "Carmellos," the name of a rival street gang. Two witnesses also said that the shooter had large tattoos on his chest and stomach. The defense sought to obtain information from the Sheriff's Department's "Cal Gang" files in order to prepare a photographic lineup of Carmellos gang members with tattoos on their chests and stomachs in order to demonstrate that the identifications of Luna and Picado were not accurate.[2] During trial,

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[2] The initial request by the defense was very broad, then it was amended, narrowing the scope.

out of the presence of the jury, the defense renewed its request and the court called Sergeant Newman to testify about what procedure was required to obtain those files. Sergeant Newman explained that the process was not lengthy, but after argument by counsel about the timeliness of the request, Sergeant Newman claimed a privilege and efforts were made to contact County Counsel since the District Attorney did not have access to the files. The court then stated, "This is . . . discovery that could have been done, months in advance of trial. . . . [T]his is basically a fishing expedition. You are looking to find something in the hopes that you can prove that the decedent was a gang member, in the hopes that you can put together a six pack that says someone else may say, 'Gee, that looks like the actual shooter.' You are certainly free to argue all of this. I agree that you can require Sergeant Newman to testify in trial. But [Evidence Code section] 352 gives me the discretion to exclude evidence if it[] includes the necessity of undue consumption of time and I'm going to do that at this juncture. I just feel that this [is] untimely. I'm not going to permit this to go any further. You can have Sergeant Newman testify, but I'm not going to have the sheriffs go on a fishing expedition to try to get information that should have been done months before this." The court then agreed to postpone a final ruling until County Counsel had been contacted.[3]

Later, County Counsel filed a motion to quash the subpoena on behalf of the Sheriff's Department, asserting that the evidence, which had originally been for over 2,200 records, but had only been recently narrowed to 140 records, was confidential and sensitive, and could lead to additional gang violence and thwart law enforcement. The court granted the motion to quash, stating that the broad request and only the most generalized argument for relevance did not overcome the public's interest in confidentiality.

Appellants contend that the court's ruling was prejudicial because it deprived them of their constitutional rights to due process and to present a complete defense. In support

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3 The court did not, as Luna's brief claims, first allow the discovery and then reverse itself.

of this contention, Luna cites the court's comments that the Cal Gang material would be "relevant and material" and "critical."

Luna misquotes the court's comments. The court said: "I'm still very unhappy with the fact that this wasn't done before trial. That's part of my concern. This trial is already overdue. . . . But on the other hand, I have to agree, this is pretty critical stuff. These people have been mentioned as being there, not just they are other gang members. I'm not talking about all members of Carmellos or all members of this -- but certainly people who have been identified by anyone as having been present at the party, I think the defense should be entitled to."

Later the court stated, "What I am concerned with particularly though is the defense's assertion today that the investigating officer has Cal Gangs records in his possession while he sits in court, because then he's now an investigating officer for the People. It's one thing for me to order penetration of Cal Gang records from a third party, but if the IO [has] retrieved these records and he is sitting here as an investigating officer assisting the prosecution in this trial, this is no longer just a third party privilege that's involved. . . . But ultimately what you're trying to do here is you're trying to play detective yourself. You're trying to find out who the actual shooter, was not even the shooter, but the person who was seen standing holding a gun. . . . That would certainly be relevant and material, I grant you that in and of itself. But the point is, you want all of this done so that you can initiate your own investigation in the hopes that as we saw yesterday from the witness, not just this witness, but I think it's typical, most of these people are not going to remember exactly what they said or exactly what they did or exactly how they described people at the time of the shooting. . . . So the whole idea that you can now initiate two years after the fact, an investigation and say is this the guy that you saw, when all we have the general description of a tattoo, it's not that someone can say it said Carmellos . . . it's just there was a tattoo, in the hopes of coming up with all of this at this late stage of the proceedings, I have to agree with County Counsel . . . ."

Evidence of third-party culpability need not be admitted unless it is relevant and its probative value outweighs the risk of delay, prejudice or confusion, and this decision is subject to the trial court's discretion. (*People v. Hall* (1986) 41 Cal.3d 826, 833-835.)

Here, the risk of delay outweighed the potential probative value of the proffered evidence. The amended request was not made until after trial had commenced. In addition, there was no assurance that the request would yield any incriminating evidence. There simply was no evidence that Carmellos gang members were actually present at the party. The trial court did not abuse its discretion in denying the request and appellants' constitutional rights were not violated. (*People v. Cudjo* (1993) 6 Cal.4th 585, 610.)

3. Evidence of Threats

After denying that he had identified appellants, Alarcon testified that his mother had received threatening phone calls, then said, "It was -- not a threat, but -- the other night. . . . I didn't know what my mother was talking about, so I thought someone -- one of my old friends or something was threatening my mom for some reason." Immediately thereafter, the trial court instructed the jury that it could only consider Alarcon's testimony about the threats to assess his credibility and his state of mind while testifying.

Detective Lowe testified that he had interviewed Alarcon's mother and stepfather who said that they had not received any threatening phone calls. Both Alarcon's mother and stepfather testified that they had not received any threats.

When Alarcon was called to the stand again, he denied telling Detective Lowe and the prosecutor that his mother had been threatened.

The trial court allowed testimony from Detective de Leon about gang intimidation, and allowed the prosecutor to pose a hypothetical question to him about a gang member who came to court solely for the purposes of intimidating witnesses.

Taylor, a defense witness, admitted he had been convicted of passing a bad check. Over objection by Picado's counsel, the prosecutor elicited testimony that Taylor had cashed the check after being threatened by gang members.

Appellants contend that the admission of the testimony from Alarcon deprived them of a fair trial and due process and that the prosecutor should have determined that there was no substance to the threat claim made by Alarcon before trial. They also contend that the court erred in admitting evidence that gang members use threats and intimidation to instill fear in witnesses by coming to court. Finally, they contend that the court erred in allowing evidence that Taylor, a defense witness, had been threatened by gang members when he gave information to detectives on an unrelated crime.

"Evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to the credibility of that witness and is therefore admissible. [Citation.]" (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) "There is no requirement, however, that threats be corroborated before they may be admitted to reflect on the witness's credibility. Indeed, it is not necessary to show the witness's fear of retaliation is 'directly linked' to the defendant for the threat to be admissible. [Citation.] It is not necessarily the source of the threat-but its existence-that is relevant to the witness's credibility." (*Id.* at pp. 869-870.)

Alarcon's testimony at trial in which he denied identifying Luna and Picado was highly questionable in light of his admission that it was his signature next to the photograph identifications and Detective Lowe's testimony and transcript of the interview. Alarcon's testimony about threats, and the expert's testimony about threatening behavior by gang members, would explain the change in Alarcon's testimony. It was therefore properly admitted. (*People v. Avalos* (1984) 37 Cal.3d 216, 232; *People v. Gutierrez* (1994) 23 Cal.App.4th 1576, 1588.)

On the other hand, the testimony from Taylor, a minor defense witness, that he had been threatened on an unrelated crime could not possibly have affected the jurors' verdict. Any conceivable error in admitting that testimony was utterly harmless. (*People v. Elliott* (2005) 37 Cal.4th 453, 473.)

4. Expert Testimony On Gang Behavior

Appellants contend that the expert testimony on gang behavior should not have been admitted because it was based on inadmissible hearsay and speculation, and thus their due process rights were violated.

Appellants concede that expert testimony on the psychology, customs, and methods of operations of street gangs is proper. But they claim that Detective de Leon's testimony that he had heard of a single incident in which a gang had shouted out the name of a rival gang at a crime scene should not have been admitted.

"'A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' (Evid. Code, § 720, subd. (a).) '"The trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown."' (*People v. Cooper* (1991) 53 Cal.3d 771, 813.)" (*People v. Davenport* (1995) 11 Cal.4th 1171, 1207, disapproved on another point in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5.) Gang culture and behavior is a proper subject of expert testimony. (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1551.) An expert may base his opinion on reliable hearsay. (*In re Fields* (1990) 51 Cal.3d 1063, 1070; *People v. Thomas* (2005) 130 Cal.App.4th 1202, 1208.)

Both Wright and Lopez testified they heard someone in the Explorer say "Carmenita" or "Carmellos." There was no testimony about any Carmellos gang members being at the party. The only context which could be given to this word was that the Neighborhood gang's rival was the Carmellos. The expert testimony was relevant as tending to prove that Neighborhood gang members shouted the name of the Carmellos gang in order to divert law enforcement attention. (*People v. Ward* (2005) 36 Cal.4th 186, 209.) It also was a proper subject for expert testimony. In any event, any error in admitting this testimony was harmless because de Leon's testimony established that it was not the custom or habit of gang members to shout out a rival gang's name, since in his extensive experience with gangs, he had only heard of this happening once before.

5. Jury Instruction On Natural & Probable Causes

The court instructed the jury with CALJIC No. 3.02, as follows:

"One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crimes originally aided and abetted. In order to find the defendant guilty of the crimes of murder and attempted murder as charged in counts 1 and 2, you must be satisfied beyond a reasonable doubt:

"1. That the crimes of violation of section 240 of the Penal Code, assault, or a 245(a)(2), assault with a firearm, or 246.3, negligent discharge of a firearm were committed . . . [and] 242, battery[;]

"2. That the defendant aided and abetted those crimes;

"3. That a co-principal in that crime or those crimes committed the crimes of murder and attempted murder[;] and

"4. That the crimes of murder and attempted murder were a natural and probable consequence of the commission of the crimes of battery, assault and assault with a firearm or negligent discharge of a firearm.

"In determining whether a consequence is natural and probable, you must apply an objective test, based on not what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may recently be expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

The court also defined the target crimes in this case as assault (§ 240); battery (§ 242); assault with a firearm (§ 245, subd. (a)(2)); and grossly negligent discharge of a firearm (§ 246.3). The court also told the jury that, "You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the

crime of murder or attempted murder was a natural and probable consequence of the commission of that target crime."

The prosecutor relied on three theories of liability: 1) Picado fired the shots that killed Morris and Luna fired shots but did not harm anyone; 2) neither Luna nor Picado hit Wright or Morris, but they did intend to kill, and aided and abetted the shooters; and 3) the murder and attempted murder were the natural and probable consequence of being gang members accompanied by other gang members who were armed and motivated by a fight at a party. In his rebuttal argument, he stated: "If you believe that both defendants were with their team at the time of the big rumble and if you believe that a murder and attempted murder are natural and probable consequences of a gang rumble under the circumstances of this case, then they are guilty of murder and attempted murder."

Appellants contend that CALJIC No. 3.02 should not have been given because those target crimes were not the natural and probable consequence of a fistfight between two people who were not gang members. They rely primarily on *People v. Butts* (1965) 236 Cal.App.2d 817, 836-837 and *People v. Prettyman* (1996) 14 Cal.4th 248, 268-269. *Prettyman* explained that "a defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but also for any other crime that is the 'natural and probable consequence' of the target crime." (*Prettyman, supra,* at p. 261.) A trial court has a duty to instruct sua sponte on the elements of the target crimes a defendant may have aided and abetted. (*Id.* at p. 266.) Although the jury need not unanimously agree on the target crime the defendant aided and abetted, "each juror must be convinced, beyond a reasonable doubt, that the defendant aided and abetted the commission of a *criminal act*, and that the offense actually committed was a natural and probable consequence of that act." (*Id.* at p. 268, original italics.)

Butts was disapproved of by *People v. Montes* (1999) 74 Cal.App.4th 1050. In *Montes*, the defendant and his gang confronted a member of a rival gang in a parking lot of a restaurant. A member of defendant's gang shot and killed the rival gang member. The particular gang member and the defendant previously had an altercation two months

earlier at the same restaurant. The court held in affirming the conviction of attempted murder that the attempted murder could be considered a natural and probable consequence of an assault against a rival gang member whether or not the person who committed the assault knew one of his own gang members had a weapon. The court stated, "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them. . . . [¶] [T]he circumstances in this case were such that it was reasonably foreseeable the initial confrontation would quickly escalate to gunfire." (*Id.* at p. 1056.)

Here, the evidence supported a finding that appellants had a gun which they fired at the party. They were not merely instigators of a fistfight. The natural and probable consequences of firing a gun at a crowded party would be that someone could be killed. The instruction was properly given.

6. Sufficiency of Evidence Against Luna

Luna contends that there was insufficient evidence to support his conviction. Jerome Wright, Alarcon, and Kavita Dutt all said that Luna was holding a gun. The jury heard the testimony from Wright about prior misidentifications, the testimony from Alarcon disavowing his prior identification, and the testimony from Dutt about her other misidentifications. It was entirely within its discretion to evaluate their credibility and we will not reweigh that evaluation. (*People v. Young* (2005) 34 Cal.4th 1149, 1151.) We are satisfied that there was sufficient evidence to support its conclusion that appellants were responsible for the shootings. (*People v. Staten* (2000) 24 Cal.4th 434, 460.)

7. Cumulative Error

Appellant contends that the cumulative effect of the errors constituted prejudicial error. We have reviewed the transcript thoroughly and find that the trial was a fair one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038; *People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.)

8. Sentencing

Appellants contend that the imposition of consecutive sentences was based on facts that were neither found true by the jury nor admitted by them, and thus their Sixth Amendment rights were violated. *People v. Black* (2005) 35 Cal.4th 1238, filed after appellants' opening briefs were filed, has held that *Blakely v. Washington* (2004) 542 U.S. 296 is inapplicable to the California sentencing scheme. As a result, we find that appellant's contentions have no merit.

DISPOSITION

The judgments are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

HASTINGS, J.*

We concur:

EPSTEIN, P. J.

WILLHITE, J.

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*Retired Associate Justice of the Court of Appeal, Second Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.